No. 94-1175

In The

Supreme Court of the United States

OCTOBER TERM, 1995

BANK ONE, CHICAGO, N.A.,

Petitioner,

v.

MIDWEST BANK & TRUST COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases

Statutes, Legislative Materials, and Rules

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1. Although respondent observes (Resp. Br. 8) that jurisdictional statutes should be construed "with precision and with fidelity to the terms by which Congress has expressed its wishes," *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968), respondent largely ignores the terms Congress used

in 12 U.S.C. § 4010(f). Congress authorized interbank "[l]iability under this subsection" for "damages," terms that ordinarily refer to compensation recovered in a court of law. See Pet. Br. 13. Respondent's brief does not discuss the meaning of these statutory terms, nor does it acknowledge that Congress used the identical term "liability" in § 4010(a), which respondent concedes (Resp. Br. 10) authorizes actions by persons other than banks. Similarly, although respondent recites the rule that a statute must be read as a whole, Resp. Br. 12, citing *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991), respondent ignores § 4010(d), which provides in unmistakably clear language that "[a]ny action under" § 4010 may be brought in a United States district court.[1]

Respondent argues (Resp. Br. 8-12) that Congress did not intend to authorize judicial actions under § 4010(f), because the language of § 4010(f) is different from the language of § 4010(a). The differing language of the two subsections suggests no such conclusion. Their language differs because subsection (a) provides a specific remedy to customers in the event a bank fails to make deposited funds available within the time specified by Congress, while subsection (f) delegates to the Federal Reserve Board authority to establish liability rules to govern the more complex and technical subject of interbank check payments. Nothing in either subsection indicates that

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[1] Although the Court has strictly construed certain jurisdictional statutes that raise significant concerns under principles of federalism, see, *e.g.*, *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) (diversity); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (removal), the Court has not adopted a blanket rule that all federal jurisdictional statutes, including those that confer concurrent jurisdiction on state and federal courts to decide federal claims, are strictly construed. See, *e.g.*, *Powell v. McCormack*, 395 U.S. 486, 515 (1969) (Congress intended 28 U.S.C. § 1331 "to provide a broad jurisdictional grant to the federal courts") (citations omitted).

Congress intended to provide a federal judicial forum for adjudication of one category of claims but not the other. To the contrary, both subsections authorize liability for damages and place limits on the amount of damages that can be recovered.

There is no basis for respondent's suggestion (Resp. Br. 13) that the Board lacks authority to promulgate interbank liability rules. Subsection (f) confers rulemaking authority on the Board by authorizing it to allocate "risks of loss and liability" rather than actual losses. See Pet. Br. 13-14. The title of subsection (f), "Authority to establish rules regarding losses and liability among depository institutions," confirms that conclusion. Furthermore, the EFA Act itself establishes no interbank liability rules. It would make no sense for Congress to direct the Board to adjudicate violations of non-existent rules.

2. The language that respondent quotes from the Conference Report (Resp. Br. 17-18) states that the Board is authorized "to allocate the *risks* of loss and liability in connection with any aspect of the payment system." H.R. Conf. Rep. No. 261, 100th Cong., 1st Sess. 183 (1987) (emphasis added). Contrary to respondent's suggestion, that language indicates that the Board is authorized to promulgate rules allocating risks of loss, but not to adjudicate liability for actual losses.

Respondent also asserts (Resp. Br. 18-19) that the word "person," as used elsewhere in the EFA Act, does not include depository institutions. In support of this assertion, petitioner cites 12 U.S.C. § 4009(c)(2), which refers to "any depository institution" or "any *other* person subject to the authority of the Board . . . ." (Emphasis added). Contrary to petitioner's assertion, the language of § 4009(c)(2) indicates that a depository institution *is* a "person." See also § 4010(a) ("any

person *other than* another depository institution") (emphasis added); 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise," the term "person" includes "corporations, companies, associations, firms, partnerships, and joint stock companies, as well as individuals").

On the assumption that subsection (a), as originally passed by the House and Senate, was broad enough to authorize interbank actions, respondent argues (Resp. Br. 19) that Congress should be presumed not to have intended a result that it declined to enact. Resp. Br. 19 (citing *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974)). But Congress did not simply alter the language of subsection (a) to exclude actions by banks. At the same time, it added subsection (f), which delegated to the Board authority to promulgate interbank liability rules, subject to congressionally-imposed limitations on damages. There is no indication that in so doing Congress intended to deny a federal judicial forum for interbank claims.

3. Respondent contends (Resp. Br. 22-23) that this Court's decision in *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989), is distinguishable because the Board had a stake in the underlying claim in *Coit*, and because the statutory language at issue in *Coit* was different from the language in this case.

The Court's decision in *Coit* looked to the relevant "statutory framework" and concluded "that when Congress meant to confer adjudicatory authority on FSLIC it did so explicitly and set forth the relevant procedures in considerable detail." 489 U.S. at 574. Nothing in the Court's opinion in *Coit* indicates that this principle applies only if the agency has a stake in the claims to be adjudicated.

Although the statutory language at issue in *Coit* differs from the language of subsection (f), neither provision explicitly conferred authority to adjudicate private claims on the agency, and the context of both provisions "indicates clearly that when Congress meant to confer adjudicatory authority . . . it did so explicitly and set out the relevant procedures in considerable detail." 489 U.S. at 573-74. Accordingly, the Court's reasoning in *Coit* is fully applicable to this case.

4. Respondent concedes (Resp. Br. 14) that the Board's view that it lacks authority to adjudicate private claims for damages under the EFA Act is entitled to "some deference." That concession is compelled by decisions such as *Reiter v. Cooper*, 113 S. Ct. 1213, 1221 (1993), and *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986).[2] Respondent contends that the Court should not defer to the Board's view that federal courts have jurisdiction to decide interbank disputes under § 4010 and Regulation CC. These are not unrelated questions, however, because it is highly unlikely that Congress created private liability for damages without providing a federal forum for adjudication of liability claims. See *infra* pp. 6-7.

Respondent's reliance on *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638 (1990), is misplaced. In *Adams Fruit*, the Court declined to defer to the agency's view of the scope of a statute "because Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action under the statute." 494 U.S. at 649. The issue in this case is precisely whether Congress has

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[2] Congress's ratification of the agency interpretation at issue in *CFTC v. Schor* was not the sole reason for judicial deference, but merely a reason why deference was "especially warranted." 478 U.S. at 845.

established the federal judiciary as adjudicator of interbank claims under § 4010 and Regulation CC. Respondent's argument based on *Adams Fruit* thus assumes an answer to the question presented in this case — indeed, it assumes that petitioner and the government are *correct* in arguing that the Board is not authorized to adjudicate interbank claims.[3]

5. Respondent observes (Resp. Br. 20-21) that the provisions of Regulation CC are enforceable through Section 4-103(2) of the Uniform Commercial Code, which provides that "Federal Reserve regulations and operating letters, clearing house rules, and the like," have the effect of agreements to vary the provisions of the UCC, "whether or not specifically assented to by all parties . . .." The existence of a state law cause of action under the UCC does not imply the absence of a federal cause of action under the EFA Act and Regulation CC. Congress provided a federal judicial forum for adjudication of claims by non-banks; it would be highly unusual for Congress to establish a regime of interbank liability for damages without also providing a federal forum for adjudication of interbank claims. "In the absence of a plain indication to the contrary, . . . it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law." *NLRB v. Natural Gas Utility District*, 402 U.S. 600, 603 (1971), citing *Jerome v. United States*, 318 U.S. 101, 104 (1943). See also *Adams Fruit*, 494 U.S. at 646 (rejecting contention that, "where Congress authorizes a private right of action to vindicate a federal right, we should assume that Congress has conditioned the right on the unavailability of a state remedy"). There is

[3] *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), provides no support for respondent. In that case, the Court employed traditional tools of statutory construction and concluded that Congress had provided a clear answer to the question at issue. *Id.* at 449.

no reason to think that Congress, having granted the Federal Reserve Board authority to promulgate interbank liability rules with preemptive effect, would make the availability of a forum to adjudicate violations of those liability rules turn on whether a particular State chooses to enact a provision of the UCC.

6. Contrary to respondent's assertion (Resp. Br. 19), the question whether federal courts have jurisdiction over interbank claims under 28 U.S.C. § 1331 is a subsidiary question that is fairly included within the more general question whether federal courts have subject matter jurisdiction over interbank disputes under § 4010. See S. Ct. Rule 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.").[4] In *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 607 n.6 (1978), moreover, the court held that § 1331 provided a sufficient jurisdictional basis for the suit even though the party invoking federal jurisdiction had not cited § 1331 and no party had raised the jurisdictional issue in the lower courts or in this Court. *Id.* at 607-08 n.6.

Respondent does not dispute that, if subsection (f) creates a cause of action, then the action arises under federal law for purposes of 28 U.S.C. § 1331. Respondent errs, however, in assuming (Resp. Br. 20) that if subsection (f) does not create a cause of action, then § 1331 does not apply. An action arises under federal law for purposes of § 1331 if it arises under a federal statute *or* a federal regulation promulgated pursuant to congressional authority. See Pet. Br. 21.

[4] As stated in the petition, the question presented is "Whether, despite the express grant of jurisdiction to the United States district courts in the Expedited Funds Availability Act, the 7th Circuit erred in determining that banks cannot pursue the cause of action created by the Federal Reserve Board pursuant to the Congressional delegation of authority contained in the Act." Pet. i.

Regulation CC plainly provides for an interbank cause of action, see 12 C.F.R. § 229.38, and thus § 1331 provides an additional basis for federal jurisdiction.

7. Respondent contends (Resp. Br. 21-22) that affirming the court of appeals' decision will not result in fragmented proceedings. Respondent reasons that the "Board has declined to exercise adjudicatory authority," and "[t]herefore, the only forum available to adjudicate them is the courts." *Id.* at 21. If this Court were to hold that Congress intended the Board to adjudicate interbank claims, however, the Board undoubtedly would respond by establishing some form of administrative claims tribunal, and the fragmentation discussed in petitioner's opening brief (at pp. 22-23) would occur.

Finally, respondent contends (Resp. Br. 21-22) that if an action is filed in a federal court under § 4010(a) by a plaintiff other than a bank, the court would have jurisdiction over interbank claims arising out of the same set of facts under the supplemental jurisdiction statute, 28 U.S.C. § 1367. Section 1367 does not apply if Congress has "expressly provided otherwise." *Id.* Elsewhere in its brief, respondent contends (Resp. Br. 13) that § 4010 "expressly" precludes federal jurisdiction over interbank actions.

For the foregoing reasons, and those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 6, 1995